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In the

Supreme Court of the United States

October Term, 1950

SOUTHERN PACIFIC COMPANY, a corporation, and T. C. GEROUSBECK, *Petitioners*,

vs.

ALICE M. SMITH, as Administratrix of the Estate of Sidney A. Smith, deceased, *Respondent*,

and

SOUTHERN PACIFIC COMPANY, a corporation, and T. C. GEROUSBECK, *Petitioners*,

vs.

ALICE M. SMITH, *Respondent*.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INDEX

	PAGE
Opinions below	2
Jurisdiction	2
Question presented	3
Statement	3
Specifications of errors to be urged	5
Reasons for granting writ	6
Prayer	8

CASE CITED

McFarland v. B. F. Goodrich Rubber Co., 8 Cir., 47 F 2d 44	6

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To: Hon. Fred M. Vinson, Chief Justice, and Associate Justices of the Supreme Court of the United States:

The petition of Southern Pacific Company, a corporation, and T. C. Gerousbeck, an individual, for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit, entered on February 21, 1951, reversing the judgments entered on

May 8, 1950 by the United States District Court for the District of Oregon, respectfully shows:

NOTE

These two cases were consolidated for trial in the District Court and consolidated for appeal in the Court of Appeals. Identical issues are raised in each case. For this reason a single petition is filed for a Writ of Certiorari in each of these cases. Page numbers of the record will refer first to the case where Alice M. Smith brought action on her own behalf, and second to the case where Alice M. Smith brought action in her capacity as Administratrix.

OPINIONS BELOW

The opinion of the District Court is not officially reported (R. 26, 27). However, the Findings of Fact and Conclusions of Law of the District Court entered May 8, 1950, may be found in the Record commencing at page 14, 15. The opinion of the United States Court of Appeals for the Ninth Circuit dated February 21, 1951 may be found in 187 F. 2d 397 (R. 32, 33).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 21, 1951 (R. 40, 41).

A petition for rehearing, filed on March 12, 1951 was denied on April 6, 1951 (R. 40, 41). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTION PRESENTED

Whether petitioners have a right to a hearing and findings by a Federal Court on all of the issues raised by their petitions for removal before the causes are remanded to the state court.

STATEMENT

These cases arise out of a collision between an automobile with the eighteenth car of a moving freight train.

The complaints in these cases were filed in the Circuit Court of the State of Oregon. The actions were thereafter removed to the United States District Court for the District of Oregon. The petitions for removal (R. 3, 4) were based upon the grounds that there was the requisite diversity of citizenship because, although plaintiff and the individual defendant were citizens of the State of Oregon—

1. The individual defendant was joined in bad faith for the fraudulent purpose of defeating removal;

2. The complaints failed to state a cause of action against the individual defendant.

Thereafter plaintiff in each case filed a motion to remand these causes to the state court (R. 4, 5) alleging that the individual defendant was a citizen of the state of Oregon and was properly joined and served as a party defendant. The motions to remand were denied by an order of the District Court entered November 28, 1949 (R. 6, 7).

The caption of the complaints names both the railroad and the individual as defendants. Thereafter the only reference to the individual defendant in the complaints is by use of the plural words "defendants" and "they."

The complaints not only do not identify the individual defendant, but the allegations therein do not indicate his connection with the accident, his relationship with the railroad defendant, nor the duty he owed to plaintiff. For these reasons the Federal District Court found that the complaints failed to state a cause of action against the individual defendant and with this single finding denied the motions to remand. In the trial court no hearing was held on the issue of joinder in bad faith because the question of the propriety of the removal was determined by the finding that the complaints did not state a cause of action against the individual defendant.

After a plenary proceeding resulting in judgments

for the defendants an appeal was taken to the United States Court of Appeals for the Ninth Circuit, presenting the single issue of whether these actions were properly removed. The finding of the trial court on this issue was reversed, the Appellate Court concluding that the complaints did state a cause of action against the individual defendant.

Significantly, there has been no finding on the other issue raised by the petitions for removal, to-wit: whether the individual defendant was joined in bad faith to prevent removal. Your petitioners have substantial evidence to support this contention. The Court of Appeals in its decision reversing the lower court has tacitly foreclosed this issue by remanding these cases to the District Court with directions to vacate the judgments and to remand the cases to the state court.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In ordering the court below to remand these cases to the state court, without first directing the lower court to hear and make findings on all of the issues raised in the removal petition.

2. In reversing the trial court in its finding that the

complaints did not state a cause of action against the individual defendant.

3. In reversing the judgments of the District Court.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has denied to your petitioners their day in court with respect to certain allegations contained in their petitions for removal.

2. The judgments of the Court of Appeals in the instant cases are in conflict with the judgment of the Court of Appeals for the Eighth Circuit in *McFarland v. B. F. Goodrich Rubber Co.*, 8 Cir., 47 F. 2d 44.

In the *McFarland* case, *supra*, the removal petition alleged both a separable controversy and a fraudulent joinder of an individual defendant. The Court of Appeals for the Eighth Circuit found that the trial court erred in holding that the complaint stated no cause of action against the individual defendant. The Appellate Court then pointed out that Federal jurisdiction had been retained by the District Court because of its erroneous view as to a sole controversy and that no ruling had been made on the issue of fraudulent joinder raised by the petition. The Court stated, at page 47:

> "In view of this state of the record, we think defendant Goodrich Co. should be afforded an op-

portunity to introduce evidence as to fraudulent joinder and to have a ruling thereon."

The cause was remanded with instructions for further proceedings consistent with the opinion.

Compare the above quotation with the following excerpt from the opinion of the Court of Appeals for the Ninth Circuit in the instant case found at page 400 of the official reporter (R. 36, 37):

> "While the pleadings may be deemed amended by evidence introduced at the hearing (in this case the deposition of Alice M. Smith) the record fails to reveal any finding of fact by the trial court on the question of fraudulent joinder. We are not free to make our own finding on this question."

And at page 402 (R. 39, 40):

> "The judgments are reversed and the cases are remanded to the district court with directions to vacate the judgments and to remand the cases to the state court."

Heretofore there has been a trial on the merits in these cases. Before the Federal Court loses jurisdiction of the instant causes it should determine the question of fraudulent joinder presented by the removal petitions and supporting affidavits and evidence introduced at the hearing.

PRAYER

WHEREFORE, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court the transcript of the record in the above entitled causes and all the proceedings in said United States Court of Appeals to the end that said causes may be reviewed and determined by this Court, and the judgments of the United States Court of Appeals for the Ninth Circuit be reversed and the cases remanded for further proceeding according to law.

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